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ARE THE WELFARE STATE AND RELIGIOUS FREEDOM INCOMPATIBLE?

THOMAS C. BERG*

I. THE WELFARE STATE, RELIGIOUS FREEDOM, AND RELIGIOUS ACCOMMODATIONS

Is the welfare state compatible with religious freedom? It is perhaps understandable that some conservatives and libertarians answer that question "No." Many of today's high-profile disputes over religious freedom involve social-welfare legislation whose restrictions clash with religious tenets. Perhaps most prominent is the federal mandate on employers to cover contraception in their health-insurance policies, which triggered more than 100 lawsuits from for-profit and non-profit employers[1] and a major Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*.[2] The mandate stems from the Affordable Care Act's policy of providing a guaranteed package of coverage in employer plans and in policies on the government-subsidized health exchanges.

Another key recurring conflict is between non-discrimination claims by same-sex couples and religious-freedom claims by those who object to facilitating same-sex relationships: adoption agencies that decline to place children in same-sex families, photographers who decline to photograph same-sex weddings, and so forth.[3] These cases arise in part because of the

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* James L. Oberstar Professor of Law and Public Policy, University of St. Thomas School of Law (Minnesota). © 2014 Thomas C. Berg. The article is based on a presentation at the *Journal of Law and Public Policy*'s January 31, 2014 symposium, "Regulating the Free Market." Unless otherwise indicated, this article is current as of the end of 2014. Developments in this increasingly prominent field move too fast for updates to maintain full currency. The issues here are discussed more fully in Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103 (2015).

1. *See HHS Mandate Information Central* , THE BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (cataloging 105 cases as of April 7, 2015, and archiving documents from them).

2. 134 S. Ct. 2751 (2014).

3. For descriptions of the range of issues and varying views on them, *see* DOUGLAS LAYCOCK ET AL., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Rowman & Littlefield, 2008);

expanding class of entities subject to anti-discrimination laws. Those laws have always aimed to ensure the access of vulnerable groups to basic services in society: to "public accommodations," originally defined as hotels and inns, restaurants, theatres and other exhibition or entertainment halls, and common carriers such as buses or trains.[4] But more recently, the term "public accommodation" has expanded to cover, in many states, almost any entity that offers services or advertises to the general public.[5] Oklahoma's law, for example, defines a "place of public accommodation" in which various kinds of discrimination are forbidden as "any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds."[6] Essentially the same definition in New Mexico's law gave rise to the leading case involving a sole-proprietor photographer declining to participate in a same-sex ceremony.[7]

Unquestionably the expansion of social-welfare regulation creates new conflicts with the free exercise of religion.[8] Regulatory growth creates new conflicts with constitutional rights in general. Courts have faced this tension since the New Deal, when they largely gave up setting limits on government's basic power to regulate the economy, whether those limits came from economic liberties or from bounds on enumerated congressional powers like the Commerce Power. Instead, as the famous footnote four of the *Carolene Products* decision signaled in 1938,[9] the courts permitted general governmental power over the economy and turned instead to other

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Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. U. J.L. & SOC. POL'Y 206 (2010); Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us To A Religious Understanding Of The Public Marketplace*, 5 NW. U. J.L. & SOC. POL'Y. 236 (2010); Ira C. Lupu and Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. U. J.L. & SOC. POL'Y 274 (2010).

4. This selective definition prevailed from the first public-accommodation laws, enacted in the late 1800s, through the Civil Rights Act of 1964. *See, e.g.*, Justin Muehlmeyer, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781, 786–90 (2013).

5. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 625–26 (1984) (noting the "expansive definition" of public accommodations in "many states and municipalities"); Lauren G. Rosenblum, Note, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Law*, 72 N.Y.U. L. REV. 1243, 1251 (1997) ("[T]he concept of 'public accommodations' now sweeps well beyond the traditional category of inns, restaurants, and other common carriers, reaching 'various forms of public, quasi-commercial conduct.'") (footnotes omitted).

6. Okla. Stat. tit. 25, §§ 1402, 1401(1) (1987).

7. Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2012) (quoting N.M. Stat. Ann. 1978, §§ 28–1–2(H)); *see also* Unruh Civil Rights Act, Cal. Civ. Code § 51 (West Supp. 1997) () (prohibiting discrimination on a variety of bases "in all business establishments of every kind whatsoever.").

8. *See, e.g.*, Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375 (1990).

9. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

provisions that affirmatively barred certain government actions: discrimination against racial and religious minorities, restrictions on freedom of speech and on the right to vote, and so forth.[10]

With religious freedom, this countering strategy relied on accommodations of religion: court rulings or statutory provisions saying that otherwise valid regulations should not be applied in ways that significantly burden the religious beliefs and practices of organizations or individuals.[11] The key constitutional decision was *Sherbert v. Verner*,[12] issued in 1963 by the liberal Warren Court and written by its intellectual leader, William Brennan. The Court ruled that a Seventh-Day Adventist woman could not be denied unemployment benefits because of her refusal to work on Saturday, her Sabbath. In so doing, the Court held that the Free Exercise Clause required government to justify substantial burdens on religious freedom under strict scrutiny, that is, with proof that the burden served a compelling government interest and was the least restrictive means of doing so.[13] Courts mandated accommodations in other cases too, including *Wisconsin v. Yoder*,[14] where the Amish objected to compulsory schooling after age fourteen. And legislatures, which had included religious accommodations in statutes since the beginning of the Republic—for example, draft exemptions for pacifists—did so more and more as statutes multiplied in the regulatory state.[15] The Supreme Court shrunk constitutionally mandated accommodations in *Employment Division v. Smith*,[16] which upheld the application of criminal drug laws to Native American believers who use peyote as a sacrament in worship.

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10. Among the many potential sources on this fundamental shift, *see, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 122 (Sanford V. Levinson rev. 2d. ed. 1994) (describing the Court's shift from "the business-government problem" to "civil rights [i.e.] the relationship between the individual and the government"); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 244 (U. Chi. Press. 1990) ("No longer would the Court be much concerned with the controversies over social and economic legislation . . . [but the *Carolene Products* footnote] suggest[ed] that the presumption of constitutionality might have less force with respect to measures affecting specific guarantees . . ., [thus setting] the Court's agenda for the next fifty years.")

11. *See, e.g.*, Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992) (defining "accommodation" as provisions "that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion"—that is, of "remov[ing] obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action").

12. 374 U.S. 398 (1963).

13. *Id.* at 406–07 (requiring the state to show that a compelling interest justified a "substantial infringement" and "that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights.").

14. 406 U.S. 205 (1972).

15. James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–47 (1992) (noting that "religious exemptions exist in over 2,000 [federal and state] statutes").

16. 494 U.S. 872 (1990).

Accommodation, however, has continued through state statutes and constitutional rulings[17] and the 1993 federal Religious Freedom Restoration Act (RFRA).[18]

Religious accommodations, which usually take the form of exemptions from a law, are sometimes derided as anomalous or as contrary to the rule of law.[19] However, they are simply an instance of a familiar principle of constitutional law: a law may be valid on its face and yet impinge on a constitutionally protected interest in its application to a particular set of facts. Religious accommodations are appropriate when a facially valid law would, in a particular application, unjustifiably burden the free exercise of religion. Whether an accommodation is mandated by a court or adopted by the legislature, it is not lawless: in all such cases, a proper legal authority determines that the accommodation either is required by an overriding law, the Constitution, or should be included in a duly enacted statute or regulation. Those same legitimate authorities also determine the accommodation's proper scope.

Religious accommodation provides the means for balancing welfare-state regulation and religious freedom. It allows religious exercise to remain free while the regulation accomplishes its goal in the vast majority of cases. Accommodation tempers regulation without undoing it. Indeed, accommodation often increases regulation's credibility, or its likelihood of passage, by removing objections to it based on religious conscience. Same-sex marriage provides an example. In three states that have recognized it legislatively—New York, Maryland, and Washington—proposed legislation offering protection only to the clergy failed to garner enough support to become law only months before revised bills passed. The fact that same-sex marriage bills with more expansive protections were enacted such a short time later suggests that exemptions mattered to the ultimate success of those bills.[20]

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17. *See* Juliet Ellperin, *31 states have heightened religious freedom protections*, WASH. POST, Mar. 1, 2014, http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/ (listing 18 states with versions of RFRA and 13 states with protective constitutional rulings). Subsequent enactments in Mississippi and Indiana raised the number of state RFRAs to 20.

18. 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

19. *See, e.g.*, *Smith*, 494 U.S. at 886, 879 (describing constitutionally mandated accommodations as "a constitutional anomaly" and as making the religious believer "a law unto himself").

20. Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1434–35, 1436–37 (2012) (footnotes omitted) (documenting the connection in detail). *See generally* McConnell, *supra* note XX, at 694 ("If there were no accommodations, the underlying legislation would become much more controversial and difficult to enact.").

Nevertheless, accommodation has developed many opponents and skeptics on both sides of the political divide. More and more voices from the left reject virtually any religious-freedom exception from generally applicable laws. In *Hosanna-Tabor Lutheran School v. E.E.O.C.*,[21] the Obama Administration argued, contrary to forty years of lower-court decisions, that there should be little or no "ministerial exception" under the Free Exercise Clause giving special protection to churches against suit. Churches, the government essentially said, should possess only the kinds of freedom of association claims that could be made by secular organizations.[22] (Strikingly, the government's argument lost in the Supreme Court 9-0.[23]) The ACLU and other liberal civil-rights groups once counted among the chief opponents of *Employment Division v. Smith* and proponents of the Religious Freedom Restoration Act.[24] Now they oppose many religious-exemption claims.[25] They commonly argue that any time an organization discriminates against employees or clients, or refuses to provide them a statutory-mandated benefit, this constitutes an impermissible harm to those parties and therefore may not be permitted by a judicial or legislative accommodation.[26]

Conservatives now are much more likely to support religious accommodation. But some on the right have been critical, or at least skeptical, arguing that the only way to protect religious freedom is to oppose the underlying welfare-state legislation, not to seek exceptions from it. For example, some defenders of opposite-sex-only marriage laws deride any possibility of a compromise that combines recognition of same-sex marriage with protections for religious liberty. Matthew Franck writes that, "[t]he preservation of meaningful religious liberty . . . is inseparable from the preservation, in our legal order, of the truth about marriage. They stand

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21. 132 S. Ct. 694 (2012).

22. Transcript of Oral Argument , *Hosanna-Tabor*, 2011 WL 4593953 at 28 (Oct. 5, 2011) (argument of Leondra R. Kruger, for the United States) ("The contours—the inquiry that the Court has set out as to expressive associations we think translate quite well to analyzing the claim that [the religious school] has made here. And for this reason, we don't think that the job duties of a particular religious employee in an organization are relevant to the inquiry.").

23. *Hosanna-Tabor*, 123 S. Ct. at 706 ("We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.").

24. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV 839 (2014). Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 13 (1994) (both describing support for RFRA by ACLU, People for American Way, and similar groups).

25. *See, e.g.*, Using Religion to Discriminate, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/using-religion-discriminate;

26. A leading academic presentation of such arguments is Frederick Mark Gedicks and Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

or fall together."[27] Likewise, Robert George has written that "[t]here was never any hope of such a bargain [between marriage equality and religious accommodation] being accepted," since for marriage equality proponents "'full equality' requires that no quarter be given to the 'bigots' who want to engage in 'discrimination' . . . in the name of their retrograde religious beliefs."[28] Thus, George has maintained that to defend religious freedom rights for traditionalist institutions and individuals, the only hope is to defeat same-sex marriage altogether: "there is no alternative to winning the battle in the public square over the legal definition of marriage."[29]

More generally, Franck argues, "[t]he strategy of granting ad hoc exemptions," although "appealing," is "constitutionally incoherent, and not substantially improved by reliance on RFRA as a statutory basis,"[30] He argues that the only coherent approach is to treat the underlying coercive law as invalid: for example, the Affordable Care Act's contraceptive mandate "should not be a lawful command to anyone. Coverage of such alleged 'preventive care' should return to being voluntary for all employers, as it was in the past."[31]

In this paper, I acknowledge and identify several ways in which welfare-state regulation and its logic conflict with religious freedom. My chief aim is to describe and defend how these tensions can be mediated through accommodations. My discussion here is brief, and I give far from a complete defense of accommodation against the various attacks on it. Even less do I argue here why religious freedom should be a weighty constitutional and legislative consideration in the first place. That is a subject for other papers, both as to religious freedom in general[32] and as to

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27. Matthew J. Franck, *Same-Sex Marriage and Religious Freedom, Fundamentally at Odds*, THE PUBLIC DISCOURSE (June 18, 2013), http://www.thepublicdiscourse.com /2013/06/10393/ ("After all, if redefining marriage to include same-sex couples accords with justice and moral truth, there is no good reason for the new legal order to make room for 'conscientious' religious dissenters, for clearly their consciences are malformed and unworthy of respect. Thus the fate of religious freedom, for scores of millions of Americans, stands or falls with the fate of conjugal marriage itself."); Matthew J. Franck, *Escaping the Exemptions Ghetto,* 241 FIRST THINGS 21 (2014); Hadley Arkes, *Recasting Religious Freedom*, 244 FIRST THINGS 45 (2014).

28. Robert P. George, *Marriage, Religious Liberty, and the "Grand Bargain,"* THE PUBLIC DISCOURSE, July 19, 2012, http://www.thepublicdiscourse.com/2012/07/5884/.

29. *Id.*

30. *Exemptions Ghetto, supra* note 26, at 21, http://www.firstthings.com/article/2014/03/escaping-the-exemptions-ghetto.

31. *Id. See also* Hadley Arkes, *Recasting Religious Freedom*, FIRST THINGS, June 2014, at 45, http://www.firstthings.com/article/2014/06/recasting-religious-freedom ("To the extent that we cast our arguments along the lines of 'belief' and 'sincerity,' we can do no more than plead for an exemption from the laws imposed on others. But again, that kind of argument distorts the truer moral character of the argument we are making, for some of us truly see these mandates as wrongful laws, which should be enforced on no one. We must recast the arguments that the defenders of religious freedom have been making in the courts.").

32. For recent defenses of strong free exercise protections, *see, e.g.*, JOHN T. NOONAN, THE

the autonomy of religious institutions in particular.[33] Here, I focus simply on sketching how accommodation can mediate the tensions between welfare-state regulation and religious freedom, and the extent to which accommodation does—and does not—require adopting free-market logic as against welfare-state logic. I make three major points.

II. POINTS ABOUT ACCOMMODATION

A. Accommodation Preserves the Underlying Law

The first point is simply to reiterate that accommodation does not undermine the underlying law in question. The government can respect religious freedom while applying that law in the vast majority of cases. Accommodation thus provides the means for preserving meaningful religious freedom in an age of active government.

Although accommodation involves limits on the sort of conduct regulation that has been generally permitted since the New Deal, accommodation is quite different from the intrusive judicial intervention of the pre-New-Deal era. Decisions of that era denied Congress or states the ability to regulate significant areas of the economy altogether. Under the Commerce Clause, the pre-1937 Court barred Congress from regulating employment conditions in most manufacturing industries on the ground that they affected interstate commerce only indirectly.[34] The substantive due

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LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (Harvard U. Press 1998) (originalist and doctrinal defenses); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 155–218 (1996) (doctrinal and jurisprudential defenses); Alan Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504 (2003) (doctrinal and jurisprudential defenses); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEG. ISS. 313 (1996) (originalist and doctrinal defenses); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (originalist defense); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 5 (2013) (originalist and doctrinal defenses). My own contributions on this score include Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 108-20 (2015); Thomas C. Berg, *Can Religious Freedom Be Protected As Equality?*, 85 TEX. L. REV. 1185 (2007).

33. On religious institutional freedom, *see, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 174–193 (Harv. U. Press 2013); Alan Brownstein, *The Freedom of the Church in the Modern Era: Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEG. ISS. 201 (2013); Richard W. Garnett, *The Freedom of the Church: Towards an Explanation, Translation, and Defense*, 21 J. CONTEMP. LEG. ISS. 33 (2013); Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1 WIS. L. REV. 99 (1989); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). My own efforts include Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom*, 21 J. CONTEMP. LEG. ISS. 279 (2013); and Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165 (2009).

34. *See, e.g.*, Carter v. Carter Coal Co. 298 U.S. 238 (1936) (striking down wage and hour legislation).

process doctrine of *Lochner* barred both states and the federal government from regulating wages, hours, and other employment conditions in most industries on the ground that regulation unnecessarily interfered with freedom of contract.[35] Although neither of these doctrines was rigidly laissez-faire, each significantly limited the basic power of government to regulate employment and other economic activities.

Accommodation, by contrast, allows Congress to regulate generally and simply declares as-applied exceptions for what is almost always a small number of cases. With statutory accommodations, of course, the legislature can calibrate the provision's scope to ensure that it does not undercut a law's important purposes in general. Additionally with judicial accommodations under a constitutional provision or a federal or state RFRA, the typical governing test allows the courts to tailor their relief to the religious freedom claimant and avoid undercutting regulation broadly. Under the federal RFRA, the government must show that the "application of [the law] to [the particular] person" in question, if it burdens his or her religious exercise, furthers a "compelling governmental interest" and does so by the "least restrictive means."[36] This entails, as the Supreme Court has unanimously emphasized in interpreting the statute, that courts must "look beyond broadly formulated interests justifying the general applicability of government mandates" and instead must "scrutinize[e] the asserted harm of granting specific exemptions to particular religious claimants"—since a particularized exemption is all that the court will be ordering.[37] "[I]n other words, [courts must] look to the marginal interest in enforcing" the law in the particular case and others like it.[38] By examining government interests, and ordering relief at the margin of the law in dispute rather than at its core, the court can preserve most laws' core purposes while also protecting religious freedom.

B. Accommodation Can Set Practical Balances

Second, accommodation works out the tension between regulation and religious freedom in a pragmatic way, according to the circumstances of the conflict in question. This is especially true with specific statutory accommodations, which reflect the legislature's weighing of the interests in a variety of contexts, but it is true even for the overarching approaches

35. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down state maximum-hours legislation in the general range of industries); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down congressional minimum-wage legislation for the District of Columbia, on grounds equally applicable to state laws).

36. 42 U.S.C. § 2000bb-1(b) (1993).

37. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 431 (2006); accord *Hobby Lobby*, 134 S. Ct. at 2779.

38. *Hobby Lobby,* 134 S. Ct. at 2779.

reflected in general legal standards like the compelling-interest test. That test creates a presumption against imposing substantial burdens on religious exercise but allows the government to overcome the presumption through a strong showing. When Congress restored the compelling-interest standard in 1993 through RFRA, it declared it to be "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[39]

Religious-liberty defenders should certainly push for accommodations; but progressive proponents of legislation should be open to them too. Pragmatic adjustments are part of the classical progressive attitude toward government. The original progressive movement of the early 20th century was characterized, according to one leading scholar, by "optimism, idealism, pragmatic experimentation, and a willingness to work across party lines" to balance competing social goals.[40] It makes sense to do the same for religious freedom when it conflicts with the legitimate goals of welfare regulation.

C. The Scope and Contours of Accommodation

Finally, there are various specific challenges to the idea of religious accommodation, and responding to them can help define accommodation's scope and contours.

1. Government Interests at the Margin

First, how can we draw coherent lines between government interests that override religious freedom and those that do not? An initial pragmatic answer is that the government's interest must be measured by the cost of accommodating the objector and others like him, not the cost of undermining the law in question as a whole. Again, RFRA embodies this principle explicitly: it requires the government to prove a compelling interest justifying "the application of the burden [on religious exercise] to the person," not a compelling interest justifying the law as a whole.[41] To reiterate, RFRA's test "look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants."[42] Applying this focus on harms at the margin, the Court held that RFRA protected a small sect's use of a hallucinogenic tea in

39. 42 U.S.C. § 2000bb(a)(5) (1993).

40. Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281, 1282 (2011); *see also* Kenneth I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 768 & n.26 (2006) (describing pragmatism as "a major influence on early twentieth century progressives").

41. 42 U.S.C. § 2000bb-1(b).

42. *Gonzales*, 546 U.S. at 431.

its worship services, because even though abuse of the hallucinogenic drug was likely dangerous, the government had not proven that the sect's limited sacramental use would cause such harm, or that it would lead to trafficking in the drug.[43] Likewise, in the *Yoder* decision—one of the model cases for RFRA—the Court found that education in general was an important interest but that its fundamental purposes did not require forcing the Amish to send their children to school after age 14.[44]

2. Government Interests and Alternative Means

Of course, even after narrowing the harm in question to that caused by the objector and others like him, we still must decide the seriousness of that harm. In some cases, accommodating religious conscience may be possible if—and only if—the government interest is defined modestly rather than stringently. Consider, for example, whether the government may compel Catholic Charities to place children with same-sex couples in violation of its religious beliefs. If the relevant compelling purpose of anti-discrimination law is to ensure that same-sex couples have ample ability to adopt children, then accommodating Catholic Charities creates no problem, because the evidence typically shows that many other agencies will do same-sex placements.[45] Likewise, when one wedding photographer declines to shoot a same-sex ceremony, the couple almost always can go to the very next photographer in the directory.[46] The interest in overall access to services need not clash with adherence to religious tenets. On this ground, for example, the Massachusetts Supreme Judicial Court denied the state summary judgment in a civil action against a landlord who refused to rent to an unmarried, cohabiting opposite-sex couple. The court said:

We have no indication, beyond the facts of this case, whether the rental housing policies of people such as the defendants can be accommodated . . . without significantly impeding the availability of rental housing for people who are cohabiting or wish to cohabit. Market forces often tend to discourage owners from restricting the class of people to whom they would

43. *Id.* at 436–37 (accepting the district court's findings on these points).

44. *Yoder*, 406 U.S. at 213, 221.

45. *See* Dale Carpenter, *Let Catholics Discriminate*, METROWEEKLY (Mar. 29, 2006), http://www.indegayforum.org/news/show/27350.html ("Gay couples could still adopt through dozens of other private agencies or through the state child-welfare services department itself, which places most adoptions in the state.").

46. In *Elane Photography*, *supra*, the record showed no costs incurred by the lesbian couple in finding another photographer, and the couple did not seek monetary damages. Elane Photography, LLC v. Willock, 284 P.3d 428, 433 (N.M.Ct. App. 2012). The state human-rights commission ordered the photographer to pay $6,600-plus to the couple for attorney's fees and costs, an award the couple later waived, Elane Photography LLC v. Willocks, 309 P.3d 53, 60 (N.M. 2013).

rent.[47]

To restate this argument in terms of the test of RFRA and similar state statutes: the interest in overall access does not provide a compelling reason to penalize an individual provider if ample alternative providers are available; and relying on those alternatives is a least restrictive means of satisfying the interest in access.

On the other hand, the clash between anti-discrimination laws and adherence to religious tenets is unavoidable if the government has a compelling interest in preventing each and every act of discrimination. There is no alternative means to satisfy that interest other than to penalize each objector. Some courts have accepted this definition of the government interest. The Alaska Supreme Court, for example, ruled against a small landlord who refused to rent to unmarried couples, on the ground that the state had a compelling "transactional interest in preventing discrimination based on irrelevant characteristics," regardless of whether the refusal materially impeded the couple's access:

The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination.[48]

This stricter reading of the interest behind anti-discrimination laws—the transactional interest—does put such laws in unavoidable conflict with the religious conscience of providers. By contrast, the more modest but still significant reading—which emphasizes simply ensuring ample "access" to services—enables anti-discrimination law and religious freedom to co-exist.

To describe these two interests underlying anti-discrimination law is not to choose which should apply in a given setting. We might conclude that the transactional approach should apply in some settings but the access-focused approach should apply in others. Perhaps, for example, the for-profit marketplace must be free from discrimination in each transaction, because it is especially important to ensure everyone's participation in economic life and to prevent refusals that may foment misunderstanding and resentment. Even if that is true, it would not necessarily extend to override claims by religious non-profit organizations when they lack the market power to harm the access interest (as was the case with Catholic Charities' adoption services).

In my view, the transactional approach should control in most commercial anti-discrimination cases, but in a small category of commercial cases, the focus should be on whether access remains readily

47. Att'y Gen. v. Desilets, 636 N.E.2d 233, 240 (1994).

48. Swanner v. Anchorage Equal Rights Com'n, 874 P.2d 274, 282–83 (1994).

available. That small category involves cases where the religious objector's interest is most direct and personal and therefore anti-discrimination liability would impose the most serious burden. Those are cases of sole proprietors or small-business owners providing personal services to facilitate, in a direct and focused way, a ceremony or relationship to which they object: the wedding photographer and the marriage counselor. These objectors plausibly feel the most direct personal responsibility for their contribution to others' actions. To require them to act in violation of their religious tenets on the basis of a "transactional interest" in preventing every instance of discrimination would not give religious freedom the weight it deserves. It is true that same-sex couples may experience offense, resentment, or jarring at a single provider's discriminatory refusal, even if there are ample alternative providers of the direct personal service in questions. Without denying the reality of that harm, however, we must—in order to balance rights—compare it with the harm suffered by the provider who would be forced by law either to violate his conscience, by directly supporting behavior he believes sinful, or pay fines or damage awards that, as they aggregate, may drive him from his business.[49] That harm is more serious, both in reality and in our constitutional tradition.

This approach is most consistent with the Supreme Court's recent decision in *Hobby Lobby*. There the majority was quite firm in holding that RFRA gives serious weight to religious-freedom rights and that the statute's protections extends to for-profit businesses as well as religious institutions and individuals. The majority reasoned that "RFRA was designed to provide very broad protection for religious liberty"; and it doubted "that the Congress that enacted such sweeping protection put small-business owners to the choice" of either foregoing religious-freedom protection or foregoing use of the corporate form.[50] For reasons detailed at greater length elsewhere, such protection is warranted not only by the statute but also by the importance and constitutional weight of the believer's interest in following his or her faith in all aspects of life.[51]

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49. Although the lesbian couple in *Elane Photography* waved the $6,600-plus award assessed against the photographer (according to the New Mexico Supreme Court, 309 P.3d at 60), there is of course no guarantee that the same will happen in other cases.

50. *Hobby Lobby*, 134 S. Ct. at 2767.

51. *See, e.g.*, *id.* at 2767–75; Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers*, 21 GEO. MASON L. REV. 59 (2013); for my own views, *see Welfare State*, *supra* note 1, at 113–20. The *Hobby Lobby* Court also rightly noted the connection between recognizing businesses' religious-freedom rights and affirming the premises of corporate social responsibility. *See* 134 S. Ct. at 2771 ("For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. . . . [T]here is no apparent reason why they may not further religious objectives as well." and noting that more and more states are recognizing the corporation as, the "dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners").

At the same time, the holding in *Hobby Lobby* is also limited. After firmly establishing that the closely-held companies in the case could sue under RFRA, the majority proceeded cautiously in assessing whether the mandate served a compelling governmental interest by the least restrictive means. Justice Alito's majority opinion raised questions about whether the mandate served a compelling interest, given various exceptions it already recognized.[52] However, in the end, the majority opinion avoided those questions and relied on the fact that the government already had a means for providing contraceptive coverage without employer subsidies or involvement: the so-called "non-profit accommodation" by which a religiously affiliated charity's insurer would provide the coverage itself in a separate policy. The majority found "no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate."[53]

Justice Kennedy, the crucial fifth vote, joined the majority opinion but also wrote a concurrence making even more clear his reliance on the "existing, recognized, workable, and already-implemented" non-profit accommodation, which he said "equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs."[54] While the majority opinion contained language suggesting that a new government funding program would also count as an available means,[55] Kennedy showed skepticism about that option, describing it as the "imposition of a whole new program or burden on the Government."[56]

The overall message from *Hobby Lobby*, especially considering Kennedy's key opinion, is that for-profit businesses can challenge commercial regulations that force them to violate their faith, and they will sometimes succeed, but only in a quite limited class of cases.[57] For two special reasons, the contraceptive-coverage accommodation easily constituted a less restrictive means, and it made sense to extend it even to a large business like Hobby Lobby. First, the legal objection in the case was not over women receiving free or subsidized contraception, but rather over who would pay for it. The companies did not challenge the government's

52. 134 S. Ct. at 2779–82.
53. *Id.* at 2782.
54. *Id.* at 2786.
55. *Id.* at 2780–81.
56. *Id.* at 2786 (Kennedy, J., concurring).
57. As two opponents of *Hobby Lobby* put it, "the fulcrum on which this case turns—the ability of government to satisfy both religious interests and the competing concerns of employees and their dependents—suggests that . . . *Hobby Lobby* is not nearly so sweeping or radical as it may seem." Ira Lupu & Robert Tuttle, *Hobby Lobby in the Long Run*, CORNERSTONE BLOG (July 1, 2014), http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/hobby-lobby-in-the-long-run.

power to subsidize contraceptives itself.[58] As Vikram Amar and Alan Brownstein put it, writing before the *Hobby Lobby* decision, "[t]he benefits provided by the Act—generally available and affordable health insurance—are fungible, intangible goods that can be provided by either the public or private sector, . . . [a]nd the Act's beneficiaries have no reason to care about the source of the insurance."[59]

In addition, insurers could cover contraception without premiums—the solution employed for the non-profit accommodation—because, by the government's own calculations, the "costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health."[60] If insurers of religious non-profits could thus afford it, so it seems can insurers of for-profits. Likewise, the government had already determined that third-party administrators of self-insured religious non-profits' plans could, with a few adjustments, pay to cover those employees; again, the same dynamic would seem to work for self-insured for-profits.[61] Given these unusual features of contraceptive coverage, however, *Hobby Lobby* provides little or no ground for thinking that 13,000-employee businesses will prevail in other cases lacking such features.[62]

In short, RFRA worked as Congress intended. It led the Court to "strike [a] sensible balanc[e] between religious liberty and competing

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58. *See, e.g.*, Brief for Respondents, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354, 2013), WL 5720377, at *35 (arguing that government "did not explain why it could not use [Title X funding program] to redress genuine economic barriers to contraceptive access").

59. Vikram David Amar & Alan E. Brownstein, *The Narrow (and Proper) Way for the Court to Rule in Hobby Lobby's Favor*, VERDICT (Apr. 11, 2014), http://verdict.justia.com/2014/04/11/narrow-proper-way-court-rule-hobby-lobbys-favor. Amar and Brownstein urged the Court to rule on precisely the ground that (most narrowly read) it did: the ability to extend the non-profit accommodation.

60. Final Rules, Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39877 (July 2, 2013) (codified at 29 C.F.R. pts. 2510, 2590) (quoted in *Hobby Lobby*, 134 S. Ct. at 2763); *id.* at 39870–72 (finding that "[c]overing contraceptives . . . yields significant cost savings . . . after accounting for both the direct medical costs of pregnancy and the indirect costs, such as employee absence," and therefore that adding contraceptive coverage does not increase premiums).

61. *Id.*

62. Some religious non-profits have objected to the insurer-pays accommodation itself, making a variety of arguments that it still renders them complicit in the insurers' provision of abortifacients or contraceptives. After fighting these challenges for a while, the government ultimately adopted—properly, in my view—a new form allowing non-profits to give notice of their objection without specifically designating the insurer to provide the coverage. *See* Mary Agnes Carey, *FAQ: Administration's New Contraception Rules Explained*, MEDSCAPE MULTISPECIALTY (Aug. 26, 2014), http://www.kaiserhealthnews.org/stories/2013/february/01/faq-contraception-mandate-and-religious-employers.aspxform; *see also* Wheaton College v. Burwell, 134 S. Ct. 2806 (2014) (entering temporary stay ordering use of similar process for non-profit objectors). For reasons detailed elsewhere, I believe some such simplified notice procedure is likely to satisfy RFRA. *See Welfare State*, *supra* note 31, at 26, n.116.

[g]overnmental interests"[63]—requiring the government to respect both by using the alternative mechanism of payment by insurers and third-party administrators. Without RFRA and its requirement of accommodation, the Court would have had no authority to push the government toward that ready alternative.

It is somewhat more complex to apply *Hobby Lobby*'s analysis to other controversial exemption cases, for example when religious non-profits or religiously devout individuals—the Catholic adoption agency, the evangelical wedding photographer—decline to provide services they believe will be directly facilitating sin. Unlike with the insurer-pays contraception accommodation, exemptions from anti-discrimination laws create some costs for the laws' beneficiaries—even if the material cost is only that of calling the next provider in the phone directory. The case for exemption is strongest where the material costs to beneficiaries are quite small because any alternative provider is readily available (many other wedding photographers, many other adoption agencies). In such instances, accommodating the objector best serves the goal of enabling both sides to live consistently with their identities and deep commitments. It gives significant weight to religious freedom while also preserving access for same-sex couples.

However, if exemptions in the commercial sphere were to expand significantly, they would indeed impose substantial costs on same-sex couples. Thus, the argument for exempting the small wedding photographer does not justify exemption for a larger business, or for an objector who does not provide direct personal services; expanding accommodation to these categories would greatly increase the potential threat to access. The wedding photographer and florist also object to providing a service to a particular discrete event, the marriage ceremony, which they regard as sacramental or at least of great religious significance. Exempting them would not justify exempting other providers who refuse to deal with same-sex couples altogether.

Much more could be said concerning the precise balance in any given case between religious freedom and the interests of others and society. My point here is simply that we have ample conceptual resources for striking that balance in sophisticated and context-sensitive ways.

It is true, however, that giving any protection to the wedding photographer requires focusing on whether the denial of service in such cases materially affects customers' access to services in real terms. In turn, focusing on real-world access requires placing some reliance on the economic market to ensure the customer's access through other providers. We can rely on the market, the pro-accommodation argument goes, because

63. 42 U.S.C. § 2000bb(a)(5)

businesses—and charities, one could add—generally want to offer, not deny, services to interested customers, especially paying customers. Thus, the argument continues, the interest in access requires overriding religious freedom only when the objectors hold market power. The Massachusetts court relied on this logic in its case ruling for the landlord against the unmarried couple.[64]

Thus, drawing a line that makes meaningful accommodation for religious freedom sometimes requires accepting market logic and rejecting the premise that every application of welfare-state regulation is necessary. Judges and legislators who are skeptical of market-based solutions are likely to reject this logic. To that extent, religious freedom and the premises of the welfare state conflict.

Nevertheless, this use of market logic is a far cry from rejecting the underlying welfare-state law altogether. The law remains in place in the vast majority of cases; the accommodation claim does not challenge that. Additionally, the market logic does not enter for its own sake, to promote a general libertarian or market-based approach to issues of economic regulation. Critics who attack religious accommodation as a kind of "market fundamentalism" or "*Lochner*-izing"[65] wildly overstate their case. In arguments for religious accommodation, market logic serves simply as an instrument to strike the balance between the human, non-economic values of religious freedom and non-discrimination.

In the cases discussed involving denials of service by adoption agencies or wedding photographers, the interest in others' ready access to services can be satisfied by an alternative means that already exists: that is, other, willing providers. Likewise, in the case of contraceptive coverage, the government, through the non-profit accommodation, had identified an alternative provider, the insurer. Sometimes, however, the government itself can easily provide or support access. For example, in the *Hobby Lobby* dispute, the government could have expanding the existing Title X program of free contraception, or by using subsidize or tax incentives to encourage private manufacturers and distributors to do it.[66] By these mechanisms, the

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64. *See* Attorney General v. Desilets, 636 N.E.2d 233, 240 (1994)

65. *See, e.g.*, Elizabeth Sepper, Free Exercise *Lochnerism* (June 3, 2014) (unpublished manuscript) (on file with the *Harvard Journal of Law and Gender*); Nina Totenberg, *Rare Unanimity in Supreme Court Term, With Plenty of Fireworks*, NAT'L PUB. RADIO (July 6, 2014), http://www.npr.org/2014/07/06/329235293/
rare-unanimity-in-supreme-court-term-with-plenty-of-fireworks (statement from constitutional scholar Akhil Amar describing Hobby Lobby and other decisions as "the new *Lochner*"). In recent constitutional discourse, to "*Lochner*-ize" is to treat (erroneously) the economic market and the common-law rules of property and contract as the natural, pre-political order and interpret the Constitution accordingly, as the Court did in *Lochner v. New York,* 198 U.S. 45 (1905). *See* Cass R. Sunstein, Lochner*'s Legacy,* 87 COLUM. L. REV. 873 (1987).

66. *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 686 (7th Cir. 2013) (arguing that "[t]he

government would take the impact of an employer's religious-freedom rights—the refusal to provide mandated contraception—and spread it from the relatively small number of employees directly affected to a much larger group, the overall taxpaying public..[67] As Alan Brownstein has argued, in general such measures answer the objection that is unfair to shift the costs of religious exercise to other specific individuals.[68] Moreover, when the general public bears the costs, "the balancing analysis in free exercise cases is more appropriately analogized to the kinds of judicial balancing that occurs" in, for example, free speech cases, where the public bears costs such as the security measures necessary to protect unpopular speakers from angry crowds.[69]

The government-funding mechanism would work even if contraception coverage involved net costs for provider: the government would simply bear the costs, spreading them widely over the general population to avoid burdening anyone significantly. Cost spreading through government will not work in all situations; obviously, for example, there is no mechanism for the government to compensate individual discrimination plaintiffs. Even in *Hobby Lobby*, Justice Kennedy in his crucial concurring opinion spoke negatively of the alternative of new government spending on contraception, perhaps because he saw no chance that such a program would pass.[70] But in some cases, government funding is one of the alternative means that government must consider in accomplishing its goals.

A final alternative means of satisfying the government's interest is to impose an alternative duty on the religious objector, one to which she does not object. In the HHS dispute, the government could require an employer who excludes contraception to pay employees an actuarially equivalent salary supplement, which each employee could use for any purpose including buying contraception. Assuming that employers have no objection to employees using salaries for contraception—and the plaintiff-employers indicated no such objection—this alternative inserts a duty consistent with the employer's conscience to replace the duty that conflicted. Alternative duties are often, although not always, realistic "less

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government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services," and that "[n]o doubt there are other options").

67. *See Hobby Lobby*, 134 S. Ct. 2751, 2781–82 (2014).

68. Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 128–29 (2006).

69. *Id.*

70. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (describing new government spending as the "imposition of a whole new program or burden on the Government" and adding that "[t]he Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints."

restrictive means" for accomplishing the government's objective.

3. Accommodation and the Rights of Others

Opponents of accommodation in a given case often argue that the religious conduct in question cannot be protected because it imposes on the rights of specific individuals. In this formulation, there is not merely a government interest to be balanced against religious freedom; there is an individual right that absolutely limits religious freedom. After all, no one would assert that a religious believer has a free exercise right to kill another human being or steal another's property. Thus, the argument goes, whenever religious conduct infringes on a legal right of another person, it falls outside the scope of religious freedom. In its stronger form, the argument is that an accommodation allowing harm to others' legal rights violates the Establishment Clause. For example, several scholars, in articles and amicus briefs, argued that to exempt businesses from the contraception mandate would be unconstitutional because it would harm employees by denying them the valuable statutory benefit of free contraception coverage.[71] At the very least, opponents might assert that accommodations that harm others cannot be required under religious-freedom statutes, like RFRA, or state constitutional provisions that require exemptions. The government made this argument in *Hobby Lobby*, while refraining from asserting that an exemption would violate the Establishment Clause.[72]

It may seem right, on first glance, to say simply that religious freedom does not authorize one person to harm or shift costs to another. As Eugene Volokh has observed, "religious freedom rights are often articulated as a right to do what your religion motivates you to do, simply because of your religious motivation, but *only so long as it doesn't harm the rights of others*."[73] But the problem comes in defining terms like "harms" to "the rights of others." In an earlier era of smaller government, legal prohibitions generally focused on a limited set of direct harms to another's body, physical or financial property, or contractual rights. This framework certainly restricted the harms that religiously motivated conduct, like non-religiously motivated conduct, could impose on others. No one was free to commit assault, theft, or fraud, even if he did so for religious reasons.

The rise of the welfare-regulatory state has changed this. The active

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71. *See* Gedicks, *supra* note 25, at 52; Micah Schwartzman et al., *Hobby Lobby and the Establishment Clause*, BALKINIZATION (Dec. 9, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.htmlhtml (and other posts linked there).

72. *See* Reply Brief for the Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 985085, at *4.

73. Eugene Volokh, Hobby Lobby, *the Employer Mandate, and Religious Exemptions*, THE VOLOKH CONSPIRACY 46–47 (Dec. 2, 2013, 12:40 AM), http://www.volokh.com/category/hobby-lobby/ (click on "my *Hobby Lobby* posts in a single Word document").

state declares previously unrecognized legal harms. At-will employment has given way to extensive regulation of the employment relationship; the government declares it a legal harm when an employee is barred from unionizing or is discriminated against based on a prohibited factor. Businesses' freedom to deal or not deal with others has given way to increasingly wide-ranging public accommodations laws declaring discrimination in the provision of almost any good or service to be a legal harm.[74] A keystone of modern constitutional jurisprudence is that government has broad prima facie power to define, declare, and prohibit these harms.

I have analyzed this problem in greater detail elsewhere;[75] here, I only give a sketch of analysis. Religious accommodation cannot and does not seek to undo government's power to declare new legal rights and harms. At the same time, however, if religious freedom confers no right to harm others, *and* the legislature can define anything it wishes as a harm, then the regulatory state will severely constrict religious freedom. For example, once civil rights laws defined various forms of discrimination as a legal harm to employees, religious organizations faced lawsuits challenging their decisions concerning their clergy and other leaders. Religious organizations retained their ability to choose their leaders, free from second-guessing by civil courts, only because of a court-ordered religious accommodation: the ministerial exception, affirmed in *Hosanna v. Tabor*.[76]

The *Hobby Lobby* majority addressed this issue in responding to the government's argument that RFRA should never be interpreted so as to withhold a statutory benefit from third parties. The question of effects on others, the Court recognized, "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means" of advancing it.[77] But the Court went on to emphasize:

[I]t could not be reasonably maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. [If that were so, then by] framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody

74. *See,* Muehlmeyer, *supra* note 4; Roberts v. United States Jaycees, 468 U.S. 609, 625–26 (1984); Rosenblum, *supra* note 5, at 1251; tit. 25, §§ 1402, 1401(1); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2012); Unruh § 51, and accompanying text (noting the expansion of public-accommodation laws).

75. *See* Berg, *Religious Accommodation and the Welfare State*, *supra* note 1, at 130-42 (discussing harms that warrant limiting religious freedom); id. at 142-47 (discussing Establishment Clause limits on accommodations).

76. 132 S. Ct. 694, 696 (2012).

77. Burwell v. Hobby Lobby, Stores, Inc., 134 S. Ct. 2751, 2781 n.37 (2014).

could object on religious grounds, rendering RFRA meaningless.[78]

The Court cited several examples of how any regulation could be recast as a benefit to other individuals: a Muslim-owned store could be required to sell alcohol in order that its customers might benefit; a restaurant owner could be required to stay open on his Sabbath so employees of other faiths could earn wages and tips.[79] It is easy to multiply examples of accommodations that affect third parties and yet are at least constitutionally permissible, whether or not mandated by RFRA. Draft exemptions "shift harm" from the pacifist to another person who must be drafted; the clergy-penitent privilege may shift harm to the crime or tort victim who may lose the benefit of testimony.[80] In unemployment cases, like *Sherbert v. Verner*, a former worker's claim for benefits increases an employer's rate of assessment for unemployment taxes.[81] A religious ministry that feeds or shelters the homeless could be said to affect neighboring property owners.[82] Religious-freedom claims nevertheless have prevailed, and should prevail, in many of these cases. The state should not be able merely to invoke some effects on other individuals in order to refuse accommodation; it should have to make a stronger showing.

Religious accommodation offers the means to mediate between the expanded state and the free exercise of religion—to affirm the legitimacy of the former while preserving room for the latter. If we are to affirm the legitimacy of the welfare state, we cannot say that only historic common-law, libertarian harms—physical force, theft, or fraud—are cognizable grounds for overriding religious freedom. On the other hand, to preserve the importance of religious freedom in the welfare state, there must be some limits on what can count as a harm to others that justifies limiting religious freedom.

For a general standard to resolve this problem, I believe the best available formulation is that substantial restrictions on religious practices should be relieved unless the government interest in the situation is quite strong—"compelling," in RFRA's terms—and no less restrictive means can

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78. *Id.*

79. *Id.*

80. *See* Volokh, *Hobby Lobby*, *supra* note 71, at 25–27 ("I don't know of any court that has taken the view that applying the clergy-congregant exemption from the duty to testify in [the victim's] case would violate the Establishment Clause violation, despite the likely burden this would impose on [the victim]. . . . [I]t seems pretty well-settled that the exemptions are constitutionally *permissible*, notwithstanding these burdens").

81. *See, e.g.*, Volokh, *Common-Law Model*, *supra* note 25, at 1513–14, n.154 ("Unemployment compensation is generally experience-rated, so an employer's unemployment tax payments are tied to the number of claims the employer has had to pay out.")

82. *See* Chosen 300 Ministries v. City of Philadelphia, 2012 WL 3235317 (E.D. Pa. 2012) (holding that Pennsylvania's RFRA prevented city from barring religious organizations from serving homeless in city park).

be adopted without significantly compromising the government's interest. This is the standard of RFRAs, but it also provides a guide for legislatures to enact specific statutory accommodations. It is "a balancing test," but "with the thumb on the scale in favor of protecting constitutional rights."[83]

More specifically, in conducting the balance, courts or legislatures should consider several factors: (1) the immediacy and severity of the harm; (2) the nature of the claimant (for example, for-profit versus non-profit entity) and the claimant's harm; (3) the likelihood that the harm to others will repeat and accumulate; and (4) the availability of less restrictive means to prevent the harm.[84] Applying these considerations permits courts and legislatures to calibrate balances, sensitive to context, between religious freedom and other serious competing interests.

4. Alternative Burdens on the Objector as a Check on "Privilege"

Finally, as mentioned above, government can sometimes satisfy its interest without infringing religious freedom by holding the objector to an alternative obligation that does not conflict with his conscience.[85] Imposing an alternative obligation can also mitigate another problem with accommodations: the danger that the accommodated party will receive an unfair privilege or competitive advantage over others. If the accommodation is attractive in terms of secular self-interest, it can create such a privilege, and also trigger related problems: a profusion of claims, including even insincere claims. To reduce these problems, alternative burdens have been used in a number of accommodation situations, most notably the requirement of alternative service for conscientious objectors to the military draft.[86] "[The conditioning of exemptions on steps that mitigate or eliminate the secular value of the exemption," in the significant number of cases where this is possible, "will make sham claims for exemptions considerably less attractive."[87]

In the contraception-coverage case itself, the problem of insincere or self-interested exemptions was minimal. As already noted, the government

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83. Douglas Laycock, *The Religious Exemptions Debate*, 11 RUTGERS J.L. & RELIG. 139, 151–52 (2009). Even strict scrutiny will permit many applications of general laws to religious practice—unlike its results in free speech, racial discrimination, and even religious discrimination cases, where it nearly always invalidates the law. *See* Adam Winker, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 50 VAND. L. REV. 793, 861–62 (2006).

84. *See* Berg, *Religious Accommodation in the Welfare State*, *supra* note 1, at 134-42.

85. See *supra* text following note 72.

86. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1017–18 (1990) (endorsing like alternative service for draft objector as an example of a practical means of minimizing incentives to claim insincere or self-interested exemptions).

87. Brownstein, *supra* note 67, at 133.

itself determined that employers who exclude contraception end up incurring greater healthcare costs overall.[88] However, that with some other procedures, employers might have an incentive to object to coverage in order to secure lower insurance premiums. An alternative burden, to reduce that incentive, would be to require the objecting employer to provide an actuarially equivalent amount of coverage for other procedures (or alternatively a salary supplement). This solution formed part of the Health Care Conscience Rights Act, a bill proposed in Congress and supported by the Catholic bishops as a response to the insurance-coverage controversy.[89] The bill would have protected objectors from having to provide or purchase insurance covering objectionable procedures, but it explicitly preserved the government's ability to issue regulations or other guidance to ensure that health insurance coverage or group health plans excluding abortion or other items or services under this section shall have an "aggregate actuarial value at least equivalent to that of health insurance coverage or group health plans at the same level of coverage that do not exclude such items or services."[90]

CONCLUSION

All of these accommodation devices I have discussed raise further questions, and it requires judgment for a court or legislature to decide when and how to apply them. They cannot eliminate the tension between welfare-state regulation and religious freedom. On the one hand, the increasing complexity of society does sometimes warrant generally applicable regulation that limits religious practice as well. Conversely, there may be a few situations where regulation threatens important religious-freedom values and the only realistic way to protect religious freedom is to defeat or repeal the regulation entirely.

But for defenders of religious freedom, placing all the chips on defeating regulation is a very risky play. If the effort fails and the law is passed, the chance to secure meaningful accommodations has usually passed by. With same-sex marriage, in particular, the long-term odds of defeating it are now vanishingly small, given the rapid changes in both public opinion[91] and judicial attitudes: as of this writing, in early 2015, the

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88. *See supra* notes 61-62 and accompanying text; Final Rules, *supra* note 47, at 39872 (detailing arguments that "[c]overing contraceptives . . . yields significant cost savings").

89. Health Care Conscience Rights Act, S. 1204, 113th Cong., 1st Sess. (introduced June 20, 2013); H.R. 940, 113th Cong., 1st Sess. (introduced Mar. 4, 2013).

90. S. 1204, § 3(a)(3) (adding new § 1566 to the Affordable Care Act, Pub. L. 111-148); H.R. 940, § 3(a)(3) (same).

91. For example, research from the Pew Research Center has shown that "[t]he rise in support for same-sex marriage over the past decade is among the largest changes in opinion on any policy issue over this time period" (reaching 51 percent by May 2013) *Gay Marriage: Key Data Points from Pew Research*, PEW RESEARCH CENTER (June 11, 2013), http://www.pewresearch.org/key-data-points/gay-marriage-key-data-points-from-pew-research/.

Supreme Court seemed poised to declare a constitutional right to marriage equality.[92] Increasingly, to protect religious freedom, accommodation will be the only game in town.

Finally, to reiterate my main point about accommodation: there are almost always coherent ways to avoid or significantly reduce burdens on religious freedom without seriously compromising important government interests. Courts and legislatures will only undertake this task if they treat religious freedom as a weighty interest. The real questions, then, are whether our society will take religious freedom seriously, and how to convince it to do so. Those are big questions, for other papers.[93]

Even those opposed to same-sex marriage now expect, by a decisive margin (59 percent), that it is inevitable. *Id.* Millennials, born 1981 or later, are 14 percentage points more likely to favor same-sex marriage rights than Generation X members, born 1965-80 (66 percent versus 52 percent) and 25 percentage points percent more likely than baby boomers, born 1946–64 (66 versus 41 percent). *Id.*

92. Since the Court invalidated part of the Defense of Marriage Act (DOMA) in United States v. Windsor, 133 S. Ct. 2675 (2013),

there has been a nearly unbroken string of 47 rulings in 46 cases from 28 different federal courts that have held the laws of 28 states that barred same-sex couples from marrying or having their marriages recognized to be unconstitutional or that have entered partial or full injunctions against them (AL, AK, AR, AZ, CO, FL, ID, IL, IN, KS, KY, MI, MS, MT, NV, NC, OH, OK, OR, PA, SC, SD, TN, TX, UT, VA, WI, and WY). Including state courts, the total rises to 63 rulings in 59 cases from 42 different federal and state courts invalidating or enjoining the enforcement of the marriage bans of 31 states (the states in the last parenthetical, plus MO, NJ, and NM).

Pending Marriage Equality Cases, LAMBDA LEGAL (emphasis in original) (last visited Apr. 15, 2015), http://www.lambdalegal.org/pending-marriage-equality-cases.

93. See sources cited *supra* in notes 33–34.